The Consensus Fights Back: European First Principles Against the Rule of Law Crisis (part 1)

verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-1/

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> "Die Gemeinschaft ist Rechtsgemeinschaft und wird nur durch die Autorität des Rechts zusammengehalten."
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> Everling, Zur Begründung der Urteile des Gerichtshofs der Europäischen Gemeinschaften, (1994) 29 EuR 127

With the Irish judge referring questions to the Court of Justice and asking how the capture of the Polish judiciary affects her duties under the European Arrest Warrant regime has dramatically changed the landscape of the European rule of law crisis. With national judges stepping into the breach, a new legal channel is opened through which to address the crisis. We are witnessing a switch from the classic paradigm of EU law of «judges asking judges» (dialogue *via* preliminary rulings) to a more demanding « judges monitoring the judges ». This is crucial given the ineffectiveness and misguided calculations of the political institutions of the EU. With the questions posed, and concerns raised, about the systemic damage done to the Polish justice system, the Irish judge acting in her capacity as the EU judge of general jurisdiction, has elevated the discourse about the EU rule of law crisis to another level. We are now moving away from the political arena marred by cynicism and rotten compromises to the courtroom with its own logic and principles. Judges own their loyalties to the Treaties and the law that they are supposed to uphold (art. 19 TEU). The constitutional stakes could not be higher. Yet to fully grasp the constitutional importance of what has happened in the Irish High Court, the referral must be placed in more systemic and temporal context.

The«Overlapping Consensus »: The Concept

Rawls has argued that "*Citizens who affirm reasonable, but opposing comprehensive doctrines belong to an overlapping consensus: that is they generally endorse that conception of justice as giving the content of their political judgments on basic institutions; and second, unreasonable comprehensive doctrines … do not gain enough currency to undermine society's essential justice*". Consensus does not cancel diversity, quite the contrary: It responds to, and acknowledges, that society is built on diversity. Overlapping consensus requires agreement on fundamental commitments of principle: It is these essentials that I require others to respect as the condition of my own deference to decisions taken by others. In order to achieve the overlapping consensus, excluding from the consensus actors with unreasonable and irrational doctrines is not only justified, but necessary. Importantly there will never be a perfect agreement on the constitutional essentials that define the consensus as denying the disagreement would be counterfactual: persistent differences between citizens living together in a constitutional regime do create a disagreement over the final shape of the essentials. Rawls claimed that many disagreements among citizens in their understanding of justice can nevertheless lead to

similar political judgments and these similar political judgments can then lead to "overlapping rather than strict consensus". What matters, though, is that parties to the consensus agree that these disagreements will be ironed out, and spelled out within the discursive framework.

How does this matter to the EU?

The "European Overlapping Consensus" and the Power of Bargaining

At its heart, the European overlapping consensus has the constitutional tolerance and an agreement on fundamental commitment to First Principles that parties to the consensus expect and require others to uphold. The overlapping consensus relies on the acknowledgment by the members of multiple societies that they understand the essentials that bind them together and are ready to honour the influence of others on the interpretation of shared commitments. We might be different, yet we decide to paddle and look to the future together. Any attempt to remove the disagreement and difference from the European politics would be futile given the diversity of the states. Disagreement must be part of the European common enterprise and must work as a desired check on the natural centralizing push of the center (EU). The time factor is important here: overlapping consensus is subject to never-ending adjustment and mutual learning. In the words of Sabel and Gerstenberg, consensus arises from "*an ongoing historical interaction between the emergent, common political view and the comprehensive views underlying it*". "We", in the shape of the peoples of Europe, have agreed to respect others' way of life, provided that their lives and decisions respect mutually agreed-upon essentials and fundamental values.

The essence of the consensus is procedural and speaks to the plural character of the EU legal order. Evolution of EU law is seen as the product of a dialogue between all parties to the consensus and comity. Consensus and commitment to the comity are renewed through never – ending process of bargaining. The bargaining manages the *legal* and *factual* interactions of the EU and national legal orders and gives voice to national concerns. It makes sure that every party to the consensus sees himself as an *actor in*, and *architect of*, the constitutional narrative. As such bargaining over the final shape of the consensus both reinforces, and frames the pluralism that always defined „European peoples". Most importantly it shifts the emphasis from the dominant and antagonistic narrative of "*who has the last word*" over the values (this is the preferred *vantage point* of the divisive politics of resentment) to more discursive and other-regarding "*who should have the first word*" in the spirit of comity. While the former is *reactive* and deals with the conflict as *fait accompli*, the latter is preemptive and aims at diffusing the tension and framing the disagreement before it escalates into all-out conflict that might endanger the consensus.

This new approach to framing the constitutional disagreement as integral part of the consensus is *inclusive*. It caters to the pride and ambition of all participants in, and signatories of, the original consensus – the member states, citizens and EU. This is because they are all made partners in the common enterprise. It is *pragmatic*, because it recognizes the insoluble conflict of "*either … or*" and pitfalls of the claim that the question of

ultimate authority might be resolved once and for all. Consensus lasts as long as there is a *bona fide* desire to strike the reasonable balance between *European unity* and *national diversity*. It recognizes that the result must be always a function of two sides talking to each other. Bargaining is a less diplomatic form of dialogue ("*good-mannered dialogue will sort it out somehow*") because it faces up to the reality that sometimes a conflict will indeed require one party to the disagreement to step back and defer. However, this will never cancel out the validity of the consensus because disagreement and deferral are not seen through antagonistic lenses, and commonality of the core values continues despite occasional frictions. If anything, the contours of the original consensus might even evolve in response to the repeated calls for re-examination of the original deal, without however calling into question its very identity built around rule of law, democracy and human rights.

This pragmatism recognizes the validity and relevance of the original position of all participants in the bargaining. It holds out a hope that the discursive opening will allow the participants to co-exist and make the system work. Importantly, the latter's survival will depend more on the factual, rather than the normative. The*factual* is front and center, because both legal orders have an equal right to win from their own unique perspective. While each order claims the authority, it does not entail the automatic rejection of the claim made by the other. What matters is how these legal orders, each autonomous in its own right, enforce their application and respect. The bargaining placed at the service of the overlapping consensus is based on the most basic commitment of all the constitutional actors: to ensure the functionality, and the coherence of the system while at the same time searching for a compromise to accommodate all plural voices within it. There is an overarching duty to strive for such maximization of the conformity given what is possible in the *factual* and *legal* registers. However, acceptance of pluralism as part of the consensus is double-edged sword. It spells the duties for all parties to the consensus. On the one hand, as was rightly pointed out by Professor K. Lenaerts, it „*means that each national society remains free to evolve differently to its own scale of values. Value diversity must, where possible, be respected and preserved by the EU*". On the other hand, given the fact that pluralism is not an absolute value, national legal order must be other-regarding in that it must comply with any constitutional consensus that exists at EU level.

The Rule of Law as the "Heart of the European Consensus"

The Polish constitutional debacle provides an unfortunate example of how the European consensus built around the rule of law is being eroded from within. The Polish populist government claims to be respecting the rule of law, but argues *first*, that it should be interpreted differently from what was hitherto accepted as a dominant understanding of what the rule of law stands for; and *second* and more dangerously, that there is no agreement on what the rule of law entails in practice (application). This argument brings to mind what Cass Sunstein called "incompletely theorized arguments". He has argued that under the conditions of serious disagreements, constitution-making can only become possible if people agree on certain practices rather than on abstract principles or grounds

justifying these practices. Alternatively, incompletely theorized agreements might as well obtain when people agree on abstract principles , but not necessarily on what these principles entail in practice.

In the EU context, we could argue the rule of law is either*a practice* that is shared, but there is no agreement on what abstract principles underlie, and justify these practices, *or* that the rule of law is *a principle* on which all parties agree and then define a practice that could be shared by all. In the analysis that follows, however, the rule of law is understood as a fundamental principle with a clear non-negotiable minimum. Modern constitutionalism accepts that in the absence of the rule of law, contemporary constitutional democracy would be impossible. At a minimum, the rule of law requires fairly generalized rule through law; a substantial amount of predictability; a significant separation between the legislative and the adjudicative function; widespread adherence to the principle that no one is above the law. The authority that binds together the Community (Union) is the law and the respect for the law. That was the principle that underpinned the original consensus in 1951 and continues to do so now. The rule of law in the EU has a clear core and must be seen as an essential part of the consensus. It is a *fully theorized argument* with minimum content, both at the level of practice and principle. Independent and impartial courts and effective judicial review are at the heart, not at the margins, of the EU rule of law. Similarly, the case law of the Court of Justice provides strong arguments in favour of interpreting the rule of law as one of the meta-principles of the entire constitutional framework of the EU. It is the interpretation that might change, but the hard core of the principle stays: separation of powers, effective application of law, judicial review, right to an effective remedy, principle of legal certainty, legitimate expectations and the principle of proportionality. The rule of law must be recognised to be one of the foundations of the consensus in the sense that the Court's spoke in case 106/77 Simmenthal of the supremacy of EU law as forming "the very basics of the EU legal order".

How does this matter for the consensus? Without the commitment to the rule of law and the continuing confidence that parties to the consensus will guarantee the independence of their courts, parties would have never been able to come together, and to defer to each other, in the first place. This is exactly where the European consensus faces an existential challenge.

SUGGESTED CITATION Koncewicz, Tomasz Tadeusz: *The Consensus Fights Back: European First Principles Against the Rule of Law Crisis (part 1), VerfBlog,* 2018/4/05, https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-1/.